

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2018

To be argued by
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
MICHAEL J. MURELLO, :

Petitioner-Appellant, :

-against- :

THE SUPREME COURT, STATE OF NEW YORK, :
COUNTY OF KINGS; and HON. EUGENE GOLD, :
District Attorney, Kings County, :

Respondents-Appellees. :
-----X

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P/S

BRIEF FOR RESPONDENT-APPELLEES

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District Attorney, Kings County, :
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BRIEF FOR RESPONDENT-APPELLEES

Petitioner-appellant appeals from a decision of the United States District Court for the Eastern District of New York (Neaher, J.) dated January 17, 1977, denying his application for a writ of habeas corpus.* On January 28, 1977, the District Court granted petitioner-appellant a certificate of probable cause and continued his bail pending appeal.

* Petitioner-appellant stated to the District court that no evidentiary hearing was required. See Minutes of Oral Argument, December 8, 1976, Supplementary Appendix p. 10.

Questions Presented

Was the trial court's refusal to allow the withdrawal of the guilty plea proper?

Was Murello properly sentenced?

Statement of Facts

Petitioner-appellant (hereinafter Murello) was indicted twice (Kings County indictment Numbers (8037/72 and 10528/72) for the unlawful possession for the purpose of sale of unstamped packages of cigarettes as a felony pursuant to the New York Tax Law, Article 20.

Murello, an individual with at least six prior convictions dating as early as 1947, was found in broad daylight in possession of 59, 600 and 286, 200 cigarettes on the two indictments respectively.* The maximum sentence for each conviction is four years.**

* Possession of over 20,000 of such cigarettes is an E felony, New York Tax Law, § 481(2).

** New York Penal Law, § 70.00(2)(3).

On January 29, 1973, Murello entered a plea of guilty to two misdemeanor counts of unlawful possession for the purpose of sale of unstamped and untaxed cigarettes in the Supreme Court, Kings County (Titone, J.)*. On June 29, 1973, he was sentenced by Justice Titone to two consecutive one year sentences.

The conviction was affirmed by the Appellate Division, 47 A D 2d 258 (2d Dept. 1975) and the Court of Appeals, 39 N Y 2d 879 (1976). The Court of Appeals stated:

"The promise purportedly made was conditional and it was a matter of fact finding whether defendant breached the condition. On this record, therefore, the issue is beyond review in this Court."

Murello remained on bail through the State appeals. Bail was continued by the District Court pending this appeal.

The record demonstrates that Murello was promised probation only if he remained out of trouble or was not arrested. The record clearly demonstrates that Murello was fully aware of this condition, that he voluntarily agreed to it, and that the Court fulfilled all promises that it made.

* A co-defendant entered a plea of guilty on one of the indictments.

No promise appears on * record when Murello entered his plea on January 29, (A-23-38)**

On May 18, 1973, Murello's attorney attempted to withdraw the plea before the Court stated what the sentence was going to be:

"Judge, I understood at that [sic] the time of plea, that Your Honor did offer probation of -- a fine and possible probation if there was no subsequent arrest during the certain period, and of course, we agreed to that, and that is part of the record." (emphasis supplied)

"Now, I understand there was a subsequent arrest." (A20-21)

Murello stood next to his attorney and claimed that he was innocent of the new charge but made no claim that he did not know of the original promise (A21).

* The record, however, as will be shown below, demonstrates exactly what did occur. Petitioner conceded before the District Court that no evidentiary hearing was required. See Supplemental Appendix p. 10.

** Page references preceded by "A" refer to the joint appendix.

Murello's attorney continued:

"Judge, I would ask that despite the subsequent arrest, perhaps your Honor, will still consider placing him on probation with a fine." (A21-22)

In denying Murello's request to withdraw the plea, the Court stated:

"When I took the plea, I took it, and I stated on the record, if there were any subsequent arrests, that there would be no probationary period, he still gets the misdemeanor." (A22)

Sentencing was adjourned.

Murello then appeared for sentencing on June 29, 1973 (A11-19). Again, his attorney stated to the Court, in his presence:

"Now he had pleaded to misdemeanors involving two separate indictments, and I believe there was a promise of probation and a fine, and I have to also stipulate, I believe that your Honor stated if there was no other trouble up to the time of sentence. Unfortunately, there was an arrest up to the time of sentence. Now, Mr. Muriello has advised me as he advised me that day, and the Court, that he wishes to withdraw his plea under both matters, and I, of course, in turn, must advise the court of his request". (A12-13)

Murello spoke in his own behalf (A14) and declined two further opportunities to say anything on his own behalf (A15, 16-17). He presented no claim that he was unaware of the promise that probation was contingent on not getting into trouble or being arrested. Nor did he express any surprise that he was sentenced to prison.

Murello's claim in the federal courts that the trial court improperly refused him the right to withdraw his guilty plea because he was promised probation unconditionally and that he had no knowledge that the Court's promise was conditional on his not getting into further trouble is not the claim that he presented to the State appellate courts.*

Murello's claim to the State appellate courts was that having been promised probation if he was not arrested prior to sentencing, he should have been permitted to withdraw his plea prior to sentencing. His argument assumed that he knew of the promise. In the Statement of Facts of his brief to the Appellate Division, Murello stated:

* Both parties' briefs to the Appellate Division and the Court of Appeals are provided to the Court here as Respondent's Supplemental Appendix, referred to as Sup. Ap. Murello was represented by the same counsel in the State appellate courts as in the Federal proceedings.

"It seems that when the guilty pleas were taken there had in fact been a promise by Mr. Justice Titone to sentence the defendant to probation and to impose a fine, and not to incarcerate the defendant, provided that the defendant not be arrested before the imposition of sentence." (Sup. Ap. 62).

Murello's Point I started with:

"From the preceding statement of facts it is clear that the defendant had been promised probation and fine by the court itself, provided that Murello not be arrested before sentencing." (Sup. Ap. 65)

Later, he stated:

"In the present case, there was a promise of no incarceration, subject to an express (albeit impossible) condition subsequent." (Sup. Ap. 67)

See, also, Murello's brief to the New York Court of Appeals, Sup. Ap. 75.

ARGUMENT

THE TRIAL COURT'S REFUSAL
TO ALLOW THE WITHDRAWAL OF THE
GUILTY PLEA WAS PROPER. MURELLO
WAS PROPERLY SENTENCED.

The only claim properly before this Court is the claim that Murello presented to the State courts, viz. that he should have been permitted to withdraw his plea of guilty.

Murello's present claim, that the court's promise was that he would be sentenced to probation, that upon the court's failure to effectuate that promise he should have been permitted to withdraw his plea, and that he was unaware that the court's original promise was that he would receive probation only if he did not get arrested, is not the same legal or factual claim presented to the State appellate courts and therefore has not been exhausted. 28 U.S.C. § 2254(b) & (c). Picard v. Connor, 404 U.S. 270 (1971) ("[I]t is not sufficient merely that the federal habeas applicant has been through the State courts. The rule would serve no purpose if it could be satisfied by raising one claim in the State courts and another in the federal courts. . . . Accordingly, we have required a state prisoner to present the State courts with the same

claim he urges upon the federal courts." 404 U.S. at 275-76); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir.) cert. den. 409 U.S. 1045 (1967).

Insofar as Murello presents a different set of factual allegations to this Court than presented to the State courts, he must first present those facts to the State courts. United States ex rel. Cleveland v. Casscles, 479 F. 2d 15 (2d Cir. 1973); United States ex rel. Figueroa v. McMann, 411 F. 2d 915 (2d Cir. 1965). Yet, Murello admitted that the facts were all on the record so that no federal evidentiary hearing was required.*

It is clear that what happened here was entirely proper and within the guidelines of Santobello v. New York, 404 U.S. 257 (1971). Murello was promised probation if he stayed out of trouble. Such a condition, considering his long history of arrests, was not an idle or meaningless condition to be disregarded or made light of.**

* See Minutes of argument before Judge Neaher, Sup. Ap. 10.

** A petitioner's familiarity with the judicial process is a factor to be considered when determining the voluntariness of the plea. See Caputo v. Henderson, 541 F. 2d 979, 985 (2d Cir. 1976).

Murello avoided the possibility of an eight year prison term.

Murello was then arrested, for a "similar matter involving untaxed cigarettes" (A21). He had not kept his part of the bargain.

Thus, the trial court did not breach its promise since its promise was conditional (and the New York Court of Appeals so found). See United States v. Nathan, 476 F. 2d 456, 459 (2d Cir.) cert. den. 414 U.S. 823 (1973). Murello received exactly that to which he is entitled under Santobello: specific performance of the Court's promise.

The sole claim that Murello presents now is that he should have been permitted to withdraw his guilty plea. However, such a claim is not cognizable by means of federal habeas corpus. United States ex rel. Brown v. LaVallee, 424 F. 2d 457, 458, n. 2 (2d Cir. 1970) cert. den. 401 U.S. 974 (1971); United States ex rel. Best v. Fay, 239 F. Supp. 632 (S.D.N.Y. 1965), affd. on District Court opinion 365 F. 2d 832 (2d Cir. 1966), cert. denied 386 U.S. 998 (1967); United States ex rel. Irving v. Henderson, 371 F. Supp. 1266 (S.D.N.Y. 1974).

Indeed, there can be no federal constitutional right to withdraw a validly entered guilty plea since in Santobello, where the plea was induced by an unfulfilled promise, it was left to the State court to determine whether Santobello would be permitted to withdraw his guilty plea or to receive specific performance of the promise. Murello has received what he was promised.

Permission to withdraw a guilty plea once entered is a discretionary matter not only in New York State Courts, New York Criminal Procedure Law, § 220.60 (3), but also in the federal system. Fed. R. Crim. p. 32 (d); United States v. Needles, 472 F. 2d 652 (2d Cir. 1973); United States v. Lombardozzi, 436 F. 2d 878 (2d Cir. 1971).

The determination of whether a federal defendant has met his burden of establishing grounds for withdrawing his guilty plea rests within the discretion of the trial judge, which is reversible only if clearly erroneous. United States v. Lombardozzi, supra. Where a State plea is at issue, the petitioner's burden becomes greater. Where the State courts have rejected the claim, the federal court will "not interfere with their determination absent a clear issue of constitutional dimensions." United States ex rel. Scott v. Mancusi, 429 F. 2d 104, 110 (2d Cir. 1970) cert. denied 402 U.S. 909 (1971);

United States ex rel. Rosa v. Follette, 395 F. 2d 721 (2d Cir. 1968) cert. denied 393 U.S. 892 (1968); United States ex rel. Rivera v. Follette, 395 F. 2d 450 (2d Cir. 1968).

The record here demonstrates, and the only factual pattern presented to the State courts, was that Murello clearly knew that he he would stay out of prison only if he stayed out of trouble before sentencing. He was then arrested again for a similar charge involving untaxed cigarettes, so he attempted to extricate himself from the deal. He never told the State courts that he was unaware of the full nature of the bargain. Indeed, he based his argument on the assumption that he had been fully aware of the events surrounding the entry of the plea.

Murello's lack of protest, surprise or astonishment at sentencing must weigh heavily against his claim that ^{he} was unaware of the nature of the bargain. United States ex rel. Sniffen v. Follette, 439 F. 2d 1032 (2d Cir. 1971); United States ex rel. McGrath v. LaVallee, 348 F. 2d 373 (2d Cir. 1965) cert. denied 383 U.S. 952 (1966).

Murello's failure to present an affidavit from his trial counsel explaining that he never knew of the conditional nature of the court's promise also operates to mandate a denial of the writ. See, United States ex rel. Roldan v. Follette, 450 F. 2d 514 (2d Cir. 1971); United States v. Welton, 439 F. 2d 824 (2d Cir. 1974) cert. den. 404 U.S. 85 (1971); United States ex rel. Cummings v. McMann, 429 F. 2d 1295 (2d Cir. 1970);

As in United States ex rel. Scott v. Mancusi, supra, the State courts here have found no abuse of discretion in the trial court's refusal to allow Murello to withdraw his plea. The Court below also found that since Murello breached the agreement, the trial court was free to impose a prison sentence. The failure to allow withdrawal of the plea was not an abuse of discretion; Murello presents no issue of constitutional dimension.

That the trial court told Murello when the plea was entered that he would receive probation if he remained out of trouble does not render the plea invalid. It is long

settled that participation of the court in plea negotiations does not invalidate the plea under the federal Constitution. United States ex rel. Elias v. McKendrick, 439 F. 2d 771 (2d Cir. 1971); United States ex rel. Bullock v. Warden, 408 F. 2d 1326 (2d Cir. 1969) cert. den. 396 U.S. 1043 (1970); United States ex rel. Rosa v. Follette, supra, United States ex rel. McGrath v. LaVallee, supra. Notwithstanding the federal courts' rejection of such a role for the judge, Fed. R. Crim. P. 11, United States v. Werker, 535 F. 2d 191 (2d Cir. 1976) or the limitation of such a role in the ABA Standards Relating to Pleas of Guilty, that limitation is not a constitutional prohibition. United States ex rel. Robinson v. Housewright, 525 F. 2d 988 (7th Cir. 1975); Brown v. Peyton, 435 F. 2d 1352 (4th Cir, 1970) cert. denied 406 U.S. 931 (1972).

The constitutional issue is whether the plea was voluntary. Murello entered the plea aware of the condition that he could be sentenced to prison if he were arrested or "got into trouble" prior to sentencing. What Murello presents is a "mere disappointed expectation of leniency", which "is not sufficient to vitiate a plea." United States ex rel. McGrath v. LaVallee, 319 F. 2d 308 (2d Cir. 1963), after remand. 348 F. 2d 373 (2d Cir. 1965) cert. denied 383 U.S. 952 (1966).

Murello never argued to the State appellate courts that he did not know and willingly accept the condition that the trial court placed on its promise. His claim now that he did not know is disingenuous at best. Similarly, his request that this Court order an evidentiary hearing on this issue is also surprising in light of his claim to the District Court that no evidentiary hearing was necessary. See Minutes of Oral Argument. Sup. Ap. 10. Murello received exactly what objectively he should have realized as a possibility when he entered his plea. He has not met his burden of establishing by the preponderance of the evidence that his guilty plea was not voluntary and intelligently made. United States ex rel. Curtis v. Zelker, 466 F. 2d 1092 (2d Cir. 1972) cert. denied. 410 U.S. 945 (1973).

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED IN ALL RESPECTS.
MURELLO SHOULD BE REMANDED TO THE
CUSTODY OF THE NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES.
IT IS ABOUT TIME THAT THIS PERSISTENT
LAW VIOLATOR BEGIN SERVING THE
SENTENCE.

Dated: New York, New York
April 14, 1977

Respectfully submitted,

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